Due service and receipt of a copy of the within is hereby admitted

this_____day of June, 1933.

_____

Attorney General of the United States,

_____

Assistant Attorney General of the United States,

_____

General Counsel of the Bureau of Internal Revenue,

Attorneys for Respondent.

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No. 145

In the Supreme Court of the United States

OCTOBER TERM, 1933

LOUISE A. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONER

CLAUDE R. BRANCH,
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BRIEF FOR PETITIONER.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R.) is reported in 22 B.T.A. 118. The opinion of the Court of Appeals of the District of Columbia (R. 15) is reported in 65 F. (2d) 803.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1933. Petition for writ of certiorari was filed June 6, 1933. Jurisdiction is conferred on this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

The statute involved is Section 219 of the Revenue Act of 1921 (which is printed in the appendix to our brief in No. 129, pages 39-43), and also the following provisions of the Revenue Act of 1921:

> Sec. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913.

STATEMENT

This case arises from the same general state of facts as that involved in No. 129. For brevity we refer to the statement of facts made in our brief in that case. The cases differ only in that this petitioner, while receiving income from the trust, was also a remainderman entitled to succeed on the termination of the trust to one-quarter of the trust property. She is a daughter of Adolph Whitcomb. The latter died in 1914 and was the son of A. C. Whitcomb, the original testator.

The Commissioner of Internal Revenue increased the income shown on this taxpayer's return in the same manner in which he treated the cases of

the other beneficiaries of the trust. The Board of Tax Appeals, sustaining the general contentions advanced by all the beneficiaries of the trust and discussed in our brief in No. 129, therefore did not pass upon the specific questions presented only by the cases of the taxpayers who are remaindermen. The Commissioner filed petitions for review. The Court of Appeals of the District of Columbia, reversing the cases of the other beneficiaries that were before it, reversed this case also, but without discussing the issues presented by this petitioner as remainderman.

SPECIFICATION OF ERRORS

The Court of Appeals of the District of Columbia erred:

1. In holding that the order of the state court was not conclusive on the question as to what amounts were properly distributable to the beneficiaries of the trust.

2. In holding that the trustee was not obliged to withhold from distribution a reasonable allowance for depreciation of the improvements and hotel furniture.

3. In holding that the taxpayers were not entitled in their income tax returns to deduct their share of the depreciation of the trust property.

4. In reversing the decision of the Board of Tax Appeals.

Of these, number 3 is the specification peculiar to the petitioner here as remainderman.

SUMMARY OF ARGUMENT

In this case all of the reasons for reversal exist which are argued in our brief in No. 129. Moreover, in No. 145 an additional reason exists. Summarized briefly it is this—the taxpayer is not only life tenant but also remainderman. The depreciation which the hotel property and other property held by the trustee sustained during the years in question *pro tanto* exhausted the value of the corpus in which she has an interest. Consequently we submit that she should prevail here, even if this Court should reject all of the contentions made in our brief in No. 129—even if it should be held that all amounts paid to these taxpayers were properly distributed to them. See *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837 (C.C.A., 2nd), certiorari denied, 282 U.S. 897.

ARGUMENT

Although the opinion below simply assumes that there is no point of difference between the cases of beneficiaries of the trust who are also remaindermen and those who are not, we must point out the essential distinction. In its earlier decision, *Whitcomb* v. *Blair,* 58 App. D.C. 104, 105, the lower court held that "capital losses in such cases fell upon the reversioners or remaindermen, and not

upon the life tenant." In the companion cases of beneficiaries who were not remaindermen, the Circuit Court of Appeals for the Ninth Circuit said that "the loss then due to depreciation under the record in the present case is borne by remaindermen in determining the tax" (*Commissioner* v. *Freuler,* 62 F. (2d) 733).

As this taxpayer is a remainderman, she consequently is entitled to the deduction for depreciation under the provisions of section 214 (a) (8) of the Act of 1921, which provides that individuals in computing their net income shall be allowed as deductions, *inter alia,*

> "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

It is well settled that general provisions of federal income tax laws allowing deductions for depreciation and the like, such as that in the 1921 Act quoted above, are not restricted to persons owning the legal title. See, for example, *Palmer* v. *Bender,* 287 U.S. 551, 557; *Duffy* v. *Central R. R.,* 268 U.S. 55, 62, 64; *Lynch* v. *Alworth-Stephens Co.,* 267 U.S. 364.

In *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837 (C.C.A. 2nd), a beneficiary receiving income from a testamentary trust was allowed a deduction for depletion of the trust assets because, as the court said:

> "The petitioners have a property right and interest (p. 840).
>
> * * * * *
>
> "The petitioner here has the real interest in the corpus. She possesses every important attribute of ownership. She has a 75 per cent. interest in the income, and she suffers most by the depletion . . . she is in the position of one having others manage her property" (p. 841).

In that case this Court denied the Commissioner's petition for certiorari (282 U.S. 897).

In that case the Circuit Court of Appeals for the Second Circuit distinguished *Roxburghe* v. *United States,* 64 Ct. Cl. 223, upon which the Commissioner relied below, saying that in that case

> "the plaintiff was merely a beneficiary entitled only to income of the trust created for her life. She had no interest in the corpus" (p. 841).

The *Merle-Smith* decision was followed by the Board in *Alphin* v. *Commissioner,* 21 B.T.A. 1101, on the ground stated that

> "it is apparent not only that the beneficiaries had an interest in the income of the trust, but that they had an interest in the corpus in exactly the same proportion" (p. 1106).

Acquiescence of the Commissioner in this decision appears in Cumulative Bulletin X-2, p. 2.

The General Counsel of the Bureau of Internal Revenue has made a similar ruling (G.C.M. 10273, Cumulative Bulletin XI-1, p. 169) because

> "the taxpayer, A, . . . had an interest in the corpus of the C Trust" (p. 172).

The same result was reached in *Cooper* v. *Reynolds*, 60 F. (2d) 650[1]; and G.C.M. 9804, Cumulative Bulletin X-2, p. 353.

In *United States* v. *Ludey*, 274 U.S. 295, 303, this Court declared:

> In essence, the deduction for depletion does not differ from the deduction for depreciation.

The Commissioner in his brief filed in this Court in *Helvering* v. *Falk*, No. 225 (which is to follow this case in argument), states (p. 19):

> We contend that there is no difference in the position of a beneficiary of a trust with regard to depreciation and depletion.

Although that brief does not relate to the tax of a remainderman, we submit that the Commissioner is at least correct in stating that there is no difference in the position of a beneficiary of a trust with regard to depreciation and depletion. Consequently it must follow that if the attitude of the Government on depletion as manifested by its rulings which we have cited above is correct, the petitioner

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[1]The decision in this case was affirmed by the Circuit Court of Appeals for the Tenth Circuit, 64 F. (2d) 644. The case is now pending in this Court on writ of certiorari as Nos. 227, 229, October Term, 1933.

The opinion of the Circuit Court of Appeals for the Seventh Circuit in the *Falk* case (which does not involve a remainderman) is reported in 64 F. (2d) 171.

here as a remainderman, is entitled to a similar deduction.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted,

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NOVEMBER, 1933.